

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**October 20, 2005**

<b>IN RE:</b>	)	
	)	<b>DOCKET NO.</b>
<b>PETITION FOR ARBITRATION OF</b>	)	<b>03-00119</b>
<b>ITC^DELTA COM COMMUNICATIONS</b>	)	
<b>INC. WITH BELL SOUTH</b>	)	
<b>TELECOMMUNICATIONS, INC.</b>	)	
<b>PURSUANT TO THE</b>	)	
<b>TELECOMMUNICATIONS ACT OF 1996</b>	)	

---

**DISSENT OF DIRECTOR RON JONES TO THE DECISION ON ISSUE NO. 25**

---

The above-styled docket came before a panel of the Tennessee Regulatory Authority acting as arbitrators on January 12, 2004. During the deliberations, Chairman Deborah Taylor Tate and Director Pat Miller voted that BellSouth Telecommunications, Inc. ("BellSouth") is not required at this time to provide Digital Subscriber Line ("DSL") service to an end user that receives local voice service from ITC^DeltaCom Communications, Inc. ("DeltaCom") over an Unbundled Network Element Platform ("UNE-P") arrangement. The majority filed an order memorializing this decision on October 20, 2005. For the reasons stated herein, I respectfully dissent from the decision of the majority.

Issue No. 25 reads: "Where DeltaCom is the UNE-P local provider should BellSouth continue providing the end-user ADSL service where DeltaCom provides UNE-P local service to that same end-user on the same line." In other more direct words, the issue is whether BellSouth may disconnect an end user's BellSouth DSL service or refuse to provide such service because that end user chose a competitive UNE-P voice provider such as DeltaCom.

BellSouth claims that it is not required by federal law to provide DSL service as DeltaCom requests and that it should not be required to share its investment in hardware and market base.<sup>1</sup> DeltaCom asserts that BellSouth's policy is generally anti-competitive and specifically a tying violation.<sup>2</sup> DeltaCom also asserts that the policy creates a disincentive for customers to subscribe to the service of a competitive local exchange carrier ("CLEC") that uses UNE-P to provide voice service.<sup>3</sup> Not surprisingly, BellSouth disagrees with these assertions.<sup>4</sup>

I agree with certain findings of the majority and assertions of BellSouth. Nevertheless, heightened diligence and a deeper inquiry lead me to a different conclusion. Like the majority, I cannot find based on the evidence in the record that BellSouth's actions constitute a tying arrangement.<sup>5</sup> To review allegations of a tying arrangement, the decisionmaker must evaluate the relevant markets. There is little information in the record of this proceeding of the broadband market generally or the DSL market in Tennessee. Further, I agree with BellSouth that there is currently no federal requirement that BellSouth provide retail DSL to UNE-P voice customers. My inquiry, however, cannot and does not stop there.

As a Director of the Tennessee Regulatory Authority, I am instructed to "foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets."<sup>6</sup> Further, the Authority is charged with issuing orders to "prohibit cross-subsidization, preferences to competitive services, or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices."<sup>7</sup> Pursuant to these

---

<sup>1</sup> Transcript of Hearing, v III, p 628 (September 12, 2003) (Testimony of John A. Ruscilli).

<sup>2</sup> *Post-Hearing Brief of ITC/DeltaCom Communications, Inc*, pp 16-17 (October 27, 2003)

<sup>3</sup> *Id* at 17.

<sup>4</sup> *See BellSouth Telecommunications, Inc Post Hearing Brief*, pp 25-52 (October 27, 2003)

<sup>5</sup> *Final Order of Arbitration Award*, p 23 (October 20, 2005).

<sup>6</sup> Tenn. Code Ann. § 65-4-123 (2004)

<sup>7</sup> *Id* § 65-5-108(c) (2004)

statutes, it is clearly within the jurisdiction of this agency and consistent with Tennessee policy to prohibit any activity that adversely affects the provisioning of local voice service or interferes with or redirects the exercise of competitive choice by a Tennessee end user. It is my opinion that BellSouth's policy impedes and inhibits competition in the local voice service market by causing harm to CLECs and penalizing Tennessee end users.

BellSouth's policy is the type of otherwise unclassified "other anti-competitive practices" the General Assembly referred to in Tenn. Code Ann. § 65-5-108(c).<sup>8</sup> BellSouth suggests that DeltaCom is not harmed by BellSouth's policy because DeltaCom's customers that wish to subscribe to BellSouth's retail DSL service can obtain voice service from DeltaCom if DeltaCom agrees to provide that voice service using a resold BellSouth voice line.<sup>9</sup> BellSouth offers as an additional solution for DeltaCom the option that DeltaCom can create its own DSL offering or partner with a broadband/DSL provider other than BellSouth and thereby provide broadband/DSL and voice service to its customers.<sup>10</sup>

BellSouth's first offered solution suggesting that DeltaCom can switch from UNE-P to resell, unfortunately results in an outcome that is driven purely by self-serving economics of the type that is totally at odds with DeltaCom's right to select its market entry strategy unassaulted by anti-competitive practices. In order for BellSouth to agree to maintain its broadband/DSL service, it would have DeltaCom replace UNE-P lines with resold lines, which produce a greater profit margin than the UNE-P line for BellSouth. Conversely, DeltaCom loses UNE-P lines to resold lines, which produce a lower profit margin for DeltaCom. Without question, this scenario provides a decided advantage to BellSouth. BellSouth's refusal to continue broadband/DSL

---

<sup>8</sup> The Tennessee Code Commission changed the designation of this section from 65-5-208 to 65-5-108 in the 2004 Replacement Volume 11A of *Tennessee Code Annotated*

<sup>9</sup> Transcript of Hearing, v III, pp. 631-32 (Sept. 12, 2003) (Testimony of John A. Ruscilli)

<sup>10</sup> *Id.* at 632.

service to DeltaCom's UNE-P customers results in an outcome that is totally at odds with the TRA's legislative directive "to prohibit anti-competitive practices."

As to BellSouth's solution that DeltaCom provide DSL via its own facilities or through a partnership, this solution misses the mark for two reasons. First, the customers that are at issue in this docket want BellSouth's retail DSL service, not DeltaCom's DSL or another entity's broadband service. Second, this solution forces a competitor in the business of providing telecommunications services to enter an entirely different market, that is the broadband market, in order to escape existing anti-competitive pressures.

Despite BellSouth's suggestions of options open to DeltaCom, the reality is that BellSouth's policy forces DeltaCom to use one market entry strategy, resale, if DeltaCom wishes to retain its voice customer or arrange to provide broadband/DSL service to an existing BellSouth DSL customer where DeltaCom is the UNE-P voice provider. This agency consistently promotes three entry strategies - resell, leased facilities, and self provisioning - through the granting of CCNs. Moreover, these three strategies are recognized in the Federal Telecommunications Act through the duties and obligations imposed on the different types of carriers.<sup>11</sup>

BellSouth's policy not only harms CLECs, but it also harms Tennessee consumers by penalizing them for exercising their competitive choice in the local telecommunications service market. The record is undisputed that BellSouth has disconnected customers' DSL services when those customers choose to receive local service from a CLEC that provides the local

---

<sup>11</sup> See 47 U.S.C. § 251(a)(1), (b)(1), (c)(2)-(4).

service via UNE-P.<sup>11</sup> Clearly, these customers made a choice in the local voice market and were penalized by BellSouth solely for their decision.

In its recent order, the Georgia Commission identified an anti-competitive policy when it stated: "If a policy has no justification other than to maximize profits by chilling competition and removing choices from consumers then such a policy should be deemed anticompetitive."<sup>12</sup> In my opinion, BellSouth's policy with regard to the provisioning of DSL services both chills competition and frustrates consumer choice for no other reason than profit. For this reason and the aforesaid findings and conclusions, it is my opinion that BellSouth's policy of refusing to provide retail DSL service to customers receiving voice service via a UNE-P CLEC line is anti-competitive and contrary to the telecommunications policy of the State of Tennessee and that the Authority must answer Issue 25 in the affirmative. Because the majority's decision answers no to Issue 25, I must dissent from that decision.

  
\_\_\_\_\_  
Ron Jones, Director

---

<sup>11</sup> Transcript of Hearing, v III, p 631 (September 12, 2003) (Testimony of John A. Ruscilli) (responding "yes" to the question of whether DeltaCom customers have been disconnected), Mary Conquest, Pre-Filed Direct Testimony p 8 & Exh B (August 4, 2003)

<sup>12</sup> *In re Petition of MCI Metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No 11901-U, *Order on Complaint*, p 16 (November 19, 2003)